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NO.

in the
Supreme Court
of the
United States

October Term, 1982

RONALD DAVID LOVELL, RONALD HENRICH,
and EDWARD ABDENOUR,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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Counsel for Petitioners

QUESTION PRESENTED FOR REVIEW

WHETHER THE ELEVENTH CIRCUIT'S APPROVAL OF THE RANDOM SEIZURE OF THE S/V ENTERPRISE BY A ROVING COAST GUARD PATROL VIOLATED THE PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT AND WAS IN CONFLICT WITH DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Petitioners, RONALD DAVID LOVELL, RONALD HENRICH, and EDWARD ABDENOUR, respectfully

urge that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit rendered on November 3, 1982.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit is attached as part of the Appendix. (App. 2-4). This decision is reflected at 689 F.2d 423.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit. This judgment and opinion was entered on September 21, 1982 (App. 2-4), and rendered on November 3, 1982, by the denial of a timely petition for rehearing. (App. 5).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interplay between Title 14, United States Code, Section 89(a), and the Fourth Amendment to the Constitution of the United States, which provide as follows:

TITLE 14, UNITED STATES CODE, SECTION 89(a)

The Coast Guard may make inquiries, examination, inspections, searches, seizures,

and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The petitioners were convicted of possessing with intent to distribute a quantity of marijuana which was found on board the S/V ENTERPRISE on the high seas in the Windward Passage. (App. 6-9). The marijuana was discovered by agents of the United States Coast Guard following their random stop and seizure of the ENTERPRISE while on roving patrol. (App. 6-9). During pretrial proceedings before the United States District

Court for the Southern District of Florida, the petitioners unsuccessfully sought to suppress the seized marijuana. (App. 2-4).

On appeal to the United States Court of Appeals for the Eleventh Circuit, the court followed its earlier opinion in *United States v. Mazyak*, 650 F.2d 788 (11th Cir. 1981), *cert. denied*, ____ U.S. ___, 102 S.Ct. 1281 (1982), and held that Title 14, United States Code, Section 89(a) ". . . gives the Coast Guard plenary authority to stop and board American vessels on the high seas . . . even in the complete absence of suspicion of criminal activity." (App. 3). The instant certiorari proceeding follows the affirmance below.

REASONS FOR GRANTING THE WRIT

**THE ELEVENTH CIRCUIT'S APPROVAL OF
THE RANDOM SEIZURE OF THE S/V
ENTERPRISE BY A ROVING COAST GUARD
PATROL VIOLATED THE PETITIONERS'
RIGHTS UNDER THE FOURTH
AMENDMENT AND WAS IN CONFLICT
WITH DECISIONS OF THIS COURT AND
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

This case concerns the constitutionality of the stop and seizure of the American flag vessel S/V ENTERPRISE on the high seas at random by a roving Coast Guard Patrol. The Eleventh Circuit, in affirming

the District Court's refusal to suppress as evidence the fruits of that seizure, relied upon earlier decisions which authorized such Coast Guard activity pursuant to Title 14, United States Code, Section 89(a). See e.g. — *United States v. Mazyak*, *supra*, and *United States v. DeWeese*, 632 F.2d 1267 (5th Cir. 1980), *cert. denied*, ____U.S____, 102 S.Ct. 358 (1981).

This Court has, however, reached an entirely opposite result in regard to the random stop of automobiles by roving law-enforcement patrols. *Delaware v. Prouse*, 440 U.S. 648 (1979). In that case, this Court found that police had stopped a motor vehicle only to check the driver's registration and license. The stop was classified as "routine," there being observed no traffic violations. Upon approaching the automobile, the officer smelled marijuana and then observed it in plain view. The executive action in that case was condemned by this Court on the theory that, without at least an articulable suspicion that the motorist was unlicensed, or that the car was unregistered, or that either was otherwise subject to seizure for a penal violation, the stop simply was a random act by a roving patrol. As such, it could not comport with the reasonableness requirement of the Fourth Amendment. The random nature of the act was pure executive caprice, and was therefore more offensive even than the old colonial writ of assistance.

This Court's holding in *Delaware v. Prouse*, *supra*, was directly applied to Coast Guard seizures of vessels by the Ninth Circuit in *United States v. Piner*, 608 F.2d 358 (9th Cir. 1979). There the Court examined a factual setting where a Coast Guard cutter on routine patrol stopped and boarded an American vessel for a safety

and document inspection. Two tons of marijuana in plain view were seized but subsequently suppressed. The court remonstrated against the random stop and boarding of the vessel after dark for a safety and registration inspection where no cause existed to suspect noncompliance:

A stop and boarding after dark must be for cause, requiring at least a reasonable and articulate suspicion of non-compliance, or must be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard Officer.

Id. at 361. The Ninth Circuit was quick to note that its holding was adverse to the well-established position of the former Fifth Circuit. It justified its position, however, by pointing out that those cases preceded this Court's landmark decision in *Delaware v. Prouse*, *supra*.

The constitutional policy underlying this view is a rejection of random selection by the executive branch as a reasonable act of law enforcement. As early as 1975, roving border patrols were prohibited from stopping vehicles and vessels without an articulable suspicion. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). In *Prouse*, the random basis for seizure was made unlawful for all police agencies. The Coast Guard performs as a policy agency; it may accurately be analogized to a marine roving patrol. As such, when it acts without a reasonably founded suspicion that a vessel's documents are not in order, it runs afoul of the *Brignoni-Ponce* and *Prouse* proscriptions.

The petitioners' view, that the Fourth Amendment bars random Coast Guard seizures of vessels, has received substantial support from scholarly authorities. In his renowned treatise, Professor LaFave has opined:

It is certainly not fanciful to suggest that the *Prouse* decision casts a rather heavy cloud over the Fifth Circuit's rulings that Coast Guard inspections may be conducted purely at random.

3 W. LaFave, *Search and Seizure*, §10.8(f) at 117 (Supp. 1982). Moreover, in Note, *High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 Harv. L. Rev. 725, 741 (1980), the commentator observed:

Application of fourth amendment balancing principles to vessel safety searches strongly suggests that the current practice of completely discretionary random searches at sea is unconstitutional.

The instant application by the Eleventh Circuit of its interpretation of Title 14, United States Code, Section 89(a), has resulted in a serious deprivation of the petitioners' Fourth Amendment rights. Prior contrary

decisions of this Court and the Ninth Circuit, as well as policy statements by legal scholars, compel the intervention of this Court's writ of certiorari to correct the erroneous decision below.

Respectfully submitted,

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(305) 443-3303

BY: /s/

KURT MARMAR

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5580
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RONALD DAVID LOVELL, RONALD HENRICH,
EDWARD ABDENOUR,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida

(September 21, 1982)

Before RONEY, VANCE and ANDERSON, Circuit
Judges.

ANDERSON, Circuit Judge:

Appellants were found guilty of possession with intent to distribute marijuana in violation of 21 U.S.C.A. §955(a) (West 1981) and 18 U.S.C.A. §2 (West 1969). Appellants raise three issues on this appeal. We affirm the judgment of the district court.

Appellants' first contention is that the trial court erred when it permitted the government to present live testimony at the pretrial suppression hearing despite a

previously entered stipulation of facts. The trial judge carefully considered this contention, heard evidence on the issue, and found that there was no "meeting of the minds" between the parties on the issue to which the live testimony was addressed — i.e., the reasonableness of the search after the officers were on board the vessel. Accordingly, the trial judge held that the stipulation did not preclude the live testimony. We decline to disturb that finding. A careful reading of the record indicates that the parties' concern when entering the stipulation was the legality of the boarding of the ENTERPRISE; neither the negotiations leading up to the stipulation, nor the stipulation itself, were concerned with the separate issue to which the live testimony was addressed.

Appellants also contend that the Coast Guard lacked reasonable suspicion to stop and board the ENTERPRISE. However, this court has consistently held that 14 U.S.C.A. §89(a) (West 1956) gives the Coast Guard plenary authority to stop and board American vessels on the high seas to inspect for safety, documentation, and obvious customs and narcotics violations, even in the complete absence of suspicion of criminal activity. *See United States v. Mazyak*, 650 F.2d 788 (11th Cir. 1981), cert. denied, ____ U.S. ___, 102 S.Ct. 1281 (1982); *United States v DeWeese*, 632 F.2d 1267 (5th Cir. 1980), cert. denied, ____ U.S. ___, 102 S.Ct. 358 (1981); *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1979), modified on other grounds, 612 F.2d 887, cert. denied, 446 U.S. 956 (1980).

Appellants' final contention is that 42 U.S.C.A. §955(a) (West 1981) requires the government to allege and prove specific intent to distribute marijuana in the United States. This circuit recently rejected the identical argument in *United States v. Riker*, 670 F.2d 987, 988 (11th Cir. 1982).

AFFIRMED.

[FILED NOV 3 1982]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5580

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RONALD DAVID LOVELL,
RONALD HENRICH, and
EDWARD ABDENOUR,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING
(November 3, 1982)

Before RONEY, VANCE, and ANDERSON, Circuit
Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing
filed in the above entitled and numbered cause be and
the same is hereby DENIED.

ENTERED FOR THE COURT:

[Illegible]

United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CRIMINAL DIVISION

CASE NO: 81-105-CR-JE

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RONALD LOVELL et al.,

Defendants.

STIPULATION OF FACTS

Prosecuting attorney for the United States Government and defense counsel for the defendants hereby enter into the following stipulation of facts for the evidentiary hearing on defendants' motion to suppress physical evidence and statements unlawfully seized. It is stipulated as follows:

1. That the defendants have legal standing to complain for the suppression as evidence of all those items listed in their motion to suppress since the activity of the Coast Guard in this case impinged upon the right of privacy of each defendant.
2. That on March 2, 1981, the defendants were on board the American flagship S/V Enterprise, sailing east north-east in the Windward Passage at latitude and longitude coordinates 19-57.5 north and 73-51 west,

and therefore, approximately five hundred (500) nautical miles from the nearest coastline of the United States.

3. That at the above time and place, the United States Coast Guard cutter Gallatin approached the S/V Enterprise and ordered her to "heave to" for boarding. This decision to accost, halt, and board the Enterprise was made by the United States Coast Guard at random. The action of that agency was not supported by judicial warrant, nor by probable cause or reasonable suspicion of criminal conduct, nor by consent of any of the defendants, nor by a state of emergency. It was done simply because the crew of the Gallatin was on roving patrol; found Enterprise in close proximity; and halted, boarded and searched that vessel to determine if any on-board violations of federal criminal or customs laws existed.

4. That upon the boarding the S/V Enterprise, Coast Guard personnel conducted a search of the vessel. Upon finding a quantity of marijuana, these officers placed all defendants under arrest and took the S/V Enterprise in tow.

5. That numerous objects, papers and documents, including but not limited to marijuana, were seized from the Enterprise, and as well, from the persons and effects of the defendants; in addition, each defendant, as a result of his arrest, made certain statements and admissions to Coast Guard personnel and police agents of the United States Government.

6. That the Coast Guard effected the aforementioned activity under authority of 14 U.S.C. §89(a) and 19 U.S.C. §1581(a).

7. That the Coast Guard, since the beginning of 1975, has pursued a policy of stopping and boarding vessels at random on the high seas to determine whether such vessels and their crews are in violation of federal statutes. Since that time, and in the Fifth Circuit, the Coast Guard, in the execution of this policy, has been responsible for the arrest and conviction of numerous individuals charged similarly to defendants. Those Fifth Circuit Court of Appeals decisions cited in Paragraph A of defendants' Legal Memorandum of their Suppression Motion are accepted as evidence of the aforementioned statements.

8. That the instant prosecution against the defendants is one developed, made and prepared by the Coast Guard personnel.

9. That, for purposes of the evidentiary hearing on the defendants suppression motion, all facts stipulated to in this pleading shall be received into evidence and shall constitute the complete factual record of such hearing in lieu of live testimony.

The parties, therefore, through respective counsels, enter into this Stipulation of Facts for purposes of the evidentiary hearing on defendants' motion to suppress

items unlawfully seized; and as proof thereof, this 15 day of April, 1981, at Miami, Southern District of Florida, they set down and affix their signatures by and through their respective attorney-of-record.

ON BEHALF OF THE UNITED
STATES GOVERNMENT and
ATLEE WAMPLER, UNITED
STATES ATTORNEY,
SOUTHERN DISTRICT OF
FLORIDA:

/s/ Robert M. Bondi

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Assistant United States Attorney
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Miami, Florida
Telephone: (305) 350-4471

ON BEHALF OF THE
DEFENDANTS:

/s/ Jack M. Denaro

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Attorney for the Defendants
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Miami, Florida 33133
Telephone: (305) 856-6596

[FILED JUN 11 1981]

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

DOCKET NO. 81-105-CR-JE

UNITED STATES OF AMERICA

vs.

RONALD DAVID LOVELL

Defendant

JUDGMENT AND
PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government
the defendant appeared in person on this date June 11,
1981

WITH COUNSEL I Jack Denaro, Esq.

PLEA

NOT GUILTY

FINDING & JUDGMENT

There being a finding of GUILTY.

Defendant has been convicted as charged of the
offense(s) of possession with intent to distrib

approximately 8,500 pounds of marijuana; in violation of Title 21 United States Code, Section 955(a), and Title 18, United States Code, Section 2, as charged in Count Two of the Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWENTY-SEVEN (27) MONTHS, with a Special Parole Term of TWENTY-FOUR (24) MONTHS, or until otherwise discharged by due process of law.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY U.S. District Judge

/s/ Joe Eaton
JOE EATON, U.S.D.J.

Date June 11, 1981

[FILED JUN 11 1981]

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

DOCKET NO. 81-105-CR-JE

UNITED STATES OF AMERICA

vs.

EDWARD ESSA ABDENOUR

Defendant

JUDGMENT AND
PROBATION/COMMITMENT ORDER

COUNSEL

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1981

WITH COUNSEL I Jack Denaro, Esq.

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SIGNED BY U.S. District Judge

/s/ Joe Eaton

JOE EATON, U.S.D.J.

Date June 11, 1981

[FILED JUN 11 1981]

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

DOCKET NO. 81-105-CR-JE

UNITED STATES OF AMERICA

vs.

RONALD HENRICH

Defendant

JUDGMENT AND
PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government
the defendant appeared in person on this date June 11,
1981

WITH COUNSEL I Jack Denaro, Esq.

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SIGNED BY U.S. District Judge

/s/ Joe Eaton

JOE EATON, U.S.D.J.

Date June 11, 1981